

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
PETITION FOR
REHEARING**

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P/S

74-1749; 74-1840

ORIGINAL

74-1865

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

IRVING GORDON,

Plaintiff-Appellant,

v.

ROBERT L. BURR and ELPAC, INC.,

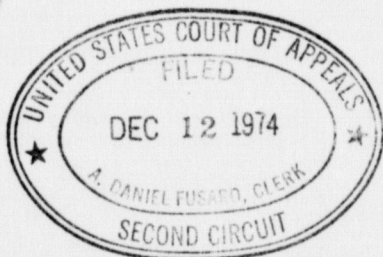
Defendants-Appellees,

and

ARNOLD LORD and PHILIPS, APPEL &
WALDEN, INC. (sued herein as PHILLIPS,
APPEL & WALDEN),

Defendants-Appellees-
Appellants.

AMENDED PETITION OF APPELLEE --
CROSS-APPELLANT LORD FOR REHEARING



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To the Honorable Judges of the United States
Court of Appeals for the Second Circuit:

Defendant-Appellee-Appellant Lord hereby respectfully petitions this Court for rehearing of that portion of its decision of November 20, 1974, which affirmed the

district court decision on the matters raised by defendant Lord's cross-appeal and thereby upheld defendant Lord's liability to plaintiff under §10(b) of the Securities Exchange Act of 1934.*

Rehearing is sought pursuant to Rule 40 of the Federal Rules of Appellate Procedure, on the ground that the above-referenced portion of this Court's decision of November 20, 1974, overlooks two dispositive deficiencies in plaintiff's case against defendant Lord under §10(b) of the 1934 Act.

The liability of defendant Lord is based solely upon a finding that he made two representations to plaintiff (Slip opinion, p. 444). This Court expressly concluded that these representations were material within the meaning of §10(b) (Slip opinion, p. 445). However, the Court did not express any conclusion with respect to the falsity of those representations, nor with respect to plaintiff's reliance thereon. The presence of both of these elements is indispensable to a finding of liability under §10(b) of the 1934 Act.

* This is an amended petition. The original petition was filed December 4, 1974. It has been withdrawn and replaced by this petition pursuant to the order of this Court enlarging to December 11, 1974, the time within which to file the petition.

Defendant Lord respectfully urges that this Court reconsider its decision with respect to his cross-appeal because there is no proof that the first representation was false and plaintiff could not have relied upon the second representation.

POINT I

THERE IS NO PROOF
OF FALSITY OF THE
FIRST ALLEGED
REPRESENTATION

This Court found the first representation to have been as follows:

. . . shortly after the June, 1968, meeting, Lord advised Gordon that the other offerees had already indicated their intention to purchase by completing certain documents; . . . (Slip opinion, p. 444).

The initial question is: did plaintiff prove by a fair preponderance of the credible evidence that this statement was false?

He did not. Plaintiff's testimony is that there were six "other offerees". He called only one of the six as a witness at trial (Stuart Steinberg, Jr. -- Appendix 235a-242a), and failed to ask him if he had completed the documents.

Nor does any other testimony, or any document

in evidence, speak to this point. Plaintiff simply made no effort to prove the falsity of this first alleged representation. Referring back to the complaint it will be recalled that plaintiff alleged nine misrepresentations. That other offerees had completed certain documents was not one of the nine. As discussed below, it appears plaintiff chose not to allege or seek to prove the falsity of such a representation because he knew that it was not false.

Whatever plaintiff's reason, the critical point is that there is no proof of falsity. This is not a situation where the question is sufficiency of the evidence or credibility of witnesses; this is a situation where the record is absolutely barren. There is not one shred of evidence from which a finding can be made that the "other offerees" did not sign the documents.

Indeed the record positively establishes that Stuart Steinberg, Jr. (the only "other offeree" who testified at trial) did intend to purchase Elpac stock from Burr as of, and after, July 18, 1968, the date on which plaintiff signed the documents in question. Plaintiff testified that Stuart Steinberg, Jr. negotiated the price of the stock down from \$12 per share to \$10 per share (Appendix 152a-153a). As of July 18, 1968, the

price was still \$12 per share (Appendix 340a-345a). Therefore Stuart Steinberg, Jr.'s intention to purchase had to have continued to exist on and after July 18, 1968. It is equally clear that plaintiff knew of Stuart Steinberg, Jr.'s interest and continuing negotiations after July 18, 1968, because he knew of the price reduction (Appendix 153a).

Plaintiff's awareness of these continuing negotiations has a two-fold significance. First, it shows that plaintiff did not rely upon execution of the documents in question as a final expression of intention. Open negotiations necessarily mean that intentions are not final, and plaintiff knew of the open negotiations. Second, and of even greater importance, the continuing negotiations between the seller of the stock and the "other offerees" proves that on and after July 18, 1968, the other offerees intended to purchase the Elpac stock, subject to satisfactory resolution of certain terms. Therefore, the essence of the statement which defendant Lord was found to have made on July 18, 1968 -- that the other offerees had indicated their intention to purchase -- was true.

Indeed the statement was true not only in

essence, but also in every detail. The "other offerees" not only "indicated their intention to purchase", they did so precisely in the manner stated, by completing the documents in question. On December 4, 1974, we (defendant Lord's attorneys) obtained from the attorneys for defendant Elpac documents which, in form, are identical to the documents signed by plaintiff on July 18, 1968, and these documents appear to have been signed by three of the other offerees. They indicate subscription for 14,000 Elpac shares. Combined with the shares for which plaintiff subscribed (4,500), 92.5% of the 20,000 shares being offered by defendant Burr are accounted for. Among the offerees who signed these documents is Arnold Steinberg, the father of Stuart Steinberg, Jr. He appears to have signed for 6,500 shares on July 16, 1968. This would explain why when Stuart Steinberg, Jr. testified for plaintiff in this action he was not asked about signature of these documents.

We have chosen not to annex copies of the newly obtained documents to this petition because they are not part of the record on this appeal, and their submission without prior approval might be deemed inappropriate. Therefore, defendant Lord hereby

requests leave to submit copies of these documents.

The threshold question presented by this offer is why no prior effort was made to introduce the documents. The answer is that from the end of the trial of this action to the present defendant Lord's attorneys have believed that plaintiff, fully aware of the truth of the alleged representation concerning signature of the documents, failed to prove (or attempt to prove) its falsity. This remains our firm conviction, and it is the primary contention of this petition -- plaintiff failed to prove that the other offerees did not sign the documents. The newly obtained documents are discussed as an alternative argument. If this Court finds that the record lacks proof of falsity there will be no need to consider proof of the truth of the alleged representation, and thus no need to consider the newly obtained documents.

POINT II

IT IS NOT POSSIBLE FOR PLAINTIFF
TO HAVE RELIED UPON THE SECOND
ALLEGED REPRESENTATION

This Court found the second representation to have been as follows:

. . . the day after Gordon wired Burr the funds, Lord (along with Burr) reassured Gordon that the other offerees had also completed their purchases. (Slip opinion, p. 444).

Here the determinative question is: could plaintiff have relied upon this representation in deciding to purchase Burr's stock?

At the latest, plaintiff concluded his decision to purchase defendant Burr's stock on August 21, one day before this second representation. The above quotation from this Court's opinion recites the chronology correctly. On August 21, 1968, plaintiff took the last action necessary on his part to close the transaction -- he delivered the price. The only representations upon which plaintiff could have relied in taking that final action were those conveyed to him on or before August 21; nothing said to him on August 22 could have caused actions taken one day before.

Despite the varying findings as to what was said on August 22, there is complete unanimity as to the day on which it was said, and that day was after the transaction. Whether the Court approaches this issue in terms of "causation-in-fact" or "reliance", the conclusion must be the same -- a representation

made after the event can not be the basis for a finding of liability under §10(b).

Although the last action by plaintiff respecting his decision to purchase Elpac stock from Burr was transmittal of the price on August 21, he had made his decision to purchase much earlier. This fact makes the absence of reliance even clearer. Plaintiff testified that he intended to purchase the stock on July 18, 1968 (Appendix 133a-134a; see also 90a-91a), and the documents he signed on that day so state (Appendix 343a). In addition, it is not disputed that as early as May-June, 1968, plaintiff actively sought out the opportunity to make a private purchase of Elpac stock at a substantial discount from market price.

Thus plaintiff's decision-making process actually concluded months before August 22, and his final act in completion of the transaction occurred on August 21, a full day before the alleged misrepresentation.

CONCLUSION

The effect of this Court's decision of November 20, 1974, is to obligate defendant Lord to return to plaintiff funds which defendant Lord never

received, possessed, or benefited from. Defendant Lord now petitions for rehearing urging that such a harsh remedy should not be imposed where plaintiff has failed to prove liability. Falsity and reliance (or causation-in-fact) may not be overlooked. It is apparent that falsity was not proved with respect to one of the two alleged representations; and that reliance was an impossibility with respect to the other. Defendant Lord respectfully requests that rehearing be granted and that the Court reverse the district court decision on the issues raised by defendant Lord's cross-appeal.

Respectfully submitted,

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Attorneys for defendant-
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Of counsel:

MICHAEL C. DEVINE

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes
and says: On *February 10, 1914* I served the
within record on appeal brief appendix on *the*
respondent by ~~leaving~~ mailing three copies thereof
at his office located at *100 Broadway, New York, N.Y.*

Sworn to before me
this *11th* day of

December, 19*14*

Lillian Weisberg
LILLIAN WEISBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires September 1, 1917

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes
and says: On April 10, 1974 I served the
within record on appeal brief appendix on
the attorney for the
respondent by leaving mailing three copies thereof
at his office located at 1 East 57th Street
New York City, New York 10022

Bert Myers

Sworn to before me
this 11th day of
April, 1974

Julian Weissberg
JULIAN WEISSBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires September 1, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes
and says: On April 10, 1974 I served the
within record on appeal brief appendix on
the attorney for the
respondent by leaving mailing three copies thereof
at his office located at 10 East 40th Street
New York City, New York 10018

Bert Myers

Sworn to before me
this 11th day of
April, 1974

Julian Weissberg
JULIAN WEISSBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires September 1, 1976

STATE OF NEW YORK
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this 11th day of
April, 1974

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JULIAN WEISSBERG
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Commission Expires September 1, 1976

